

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2044

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-2044

FRANK J. BERARD, JR.,
Appellant

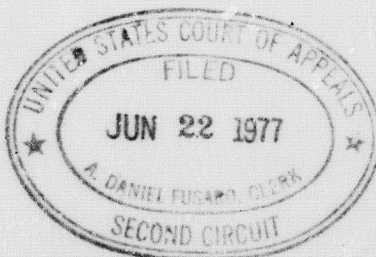
v.

CORNELIUS HOGAN,
COMMISSIONER OF CORRECTIONS
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF VERMONT

BRIEF OF APPELLEE

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ISSUES PRESENTED

The State of Vermont submits that in addition to the issues cited at p. 1 of Berard's Brief is the additional issue:

4. That even if error of a constitutional dimension could be found in the trial court's restriction on Mrs. Badore's cross-examination, because of other overwhelming evidence of Berard's guilt such error was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

The State of Vermont has no dispute with the language of Berard's Brief, including Prior Proceedings at pp. 2-4. Correction is necessary in the Statement of Facts, pp. 4-6.

The suggestion at p. 4 of Berard's Brief that he was convicted on the testimony of Mrs. Badore alone belies the importance forty eight other witnesses played in corroboration.

As to the assertion that Mrs. Badore gave "several different accounts of the murder", each document was provided the defense and permitted a full probe of any inconsistencies over a 2-1/2 day cross-examination. Apparently the jury did not regard the factual discrepancies to be of such magnitude as Berard's counsel does. Furthermore, on the current status of the law of evidence hardly presents a cause to complain to Berard that the prosecution and court declined Berard's counsel's urging that Mrs. Badore be polygraphed.

SUMMARY OF ARGUMENT

Frank J. Berard, Jr., in this appeal, challenges the denial of his application for the writ of habeas corpus by the United States District Court for the District of Vermont. His claim is based upon three areas of restriction on the cross-examination of Mrs. Linda Badore. These same areas were reviewed and affirmed by the Vermont Supreme Court as meeting the requirements of the Sixth Amendment of the United States Constitution under caselaw existing prior to Davis v. Alaska (415 U.S. 308). State v. Berard, 132 Vt. 138, 315 A.2d 501 (1974). Berard's petition for the writ of certiorari under Davis was denied by the United States Supreme Court at 417 U.S. 950. His petition on Davis grounds to the United States District Court was denied because it failed to establish an unconstitutional limitation on his right of confrontation. (Berard Brief, A-26), U.S. v. Ong, 541 F.2d 331 (CA 2 1976), cert. den. 45 LW 3509, 97 S.Ct. 814 (1977).

The State of Vermont argues that during the extended cross-examination of Mrs. Badore, no substantial obstructions to the right of Confrontation occurred which would call into question "the integrity of the fact finding process." Badore's concern over the loss of her child's custody was properly excluded, in the discretion of the trial court, because Berard's attorney conceded that no evidence of State action existed [A-6], Berard may have suggested such a concern to her, and only an unrelated report by her mother to authorities had

occurred. [State's Appendix; SA 1-2]. Thus, Mrs. Badore did not come within the "vulnerable status" described in Davis v. Alaska.

The possibility she might have planned to publish her account of the Lestage murder was properly excluded at trial. Her financial interests on the issue were speculative as to whether they would be better served by Berard's conviction or acquittal. U.S. v. Reed, 439 F.2d 1, 3-4 (CA 2 1971); U.S. v. Reed and White, 437 F.2d 57 (CA 2 1971).

Cross-examination by the vague and general questions of claimed "fantasies of criminal activity and false accusations" (A-4,5,6) were properly excluded in view of an extensive development of Badore's mental history and mental illness by her psychiatrist as such conditions may have affected her credibility. (T. 1189-90, 1191, 1199-1203, 1208-09, 1211-12). U.S. v. Ong, 541 F.2d 331.

The three areas of cross-examination referred to above were properly termed collateral and tangential to other evidence relevant to the case. (A-24,25); U.S. v. Blackwood, 456 F.2d 526, 531 (1972). For the additional reasons of remoteness, speculation and "...as he would have attempted only to rebut a supposed inference..." (U.S. v. Ong, 541 F.2d 331, 341), the exclusion was proper.

The District Court's ruling was correct that the burden of proof on the issue of alleged prejudice must be sustained by Berard. Prior law in this Circuit [Schuster v. Herald, 410 F.2d 107 (CA 2 1969)] and by a denial of certiorari by the United States Supreme Court at the same Term the Davis

opinion was handed down [Wright v. North Carolina, 483 F.2d 405, 408 (1973), cert. den. 415 U.S. 936 (1974)] has settled the issue. The test to establish prejudice is that "...it be sustained not as a matter of speculation but as a demonstrable reality." U.S. v. Handy, 351 U.S. 454, 462 (1956); Beck v. Washington, 369 U.S. 541, 558 (1962).

In its fourth argument the State undertakes to demonstrate Berard's failure to meet the requirements of establishing prejudice under Beck and U.S. v. Handy, supra. The jury was fully charged by the trial judge on the law applicable to assessing credibility (T. 1321-24, 1327-28, 1334), which presumptively they followed as to Mrs. Badore. The restriction of the three areas of cross-examination was proper on grounds of remoteness, speculation, and irrelevance as previously discussed.

ARGUMENT

I. THE DISTRICT COURT'S RULING WAS CORRECT THAT BERARD'S CLAIMS OF ERROR IN CROSS-EXAMINATION DID NOT PRESENT AN ISSUE OF CONSTITUTIONAL MAGNITUDE.

The State concurs in Berard's assertions as to the importance of cross-examination in the exercise of the Confrontation Clause of the Sixth Amendment of the United States Constitution. In relying on Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 247 (1974), however, Berard seems to suggest at p. 11 of his Brief that restriction, in any form, on cross-examination results in a per se violation of the Sixth Amendment. The Davis decision turned on the trial court's prohibition of the use of the chief witnesses' juvenile burglary probation to establish bias and prejudice. In the instant case the trial court's exclusion of certain lines of cross-examination, as will more fully appear later, was based upon traditional principles of evidence law clearly recognized in the Davis decision:

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation...Id. 415 U.S. 308, 316.

The landmark decision Alford v. U.S., forty-three years before Davis, treated the right of confrontation in a similar manner.¹

Chief District Judge Holden in his Memorandum And Order (A-25) concludes that throughout Berard's trial, and particularly during the extended (260 page) cross-examination of Mrs. Badore, there were no significant obstructions to the right of Confrontation that would call into question the "integrity of the fact finding process." Mr. Berard complains of restriction in three areas of his cross-examination of Badore. For an accurate review of the fact finding process, it is helpful to note some areas of Badore's past that were developed on direct examination as well as cross-examination. Mrs. Badore was convicted of petty larceny (T. 546-7), she had been hospitalized for mental illness four times and had attempted suicide on three occasions which apparently began when she ran away from home at sixteen years of age. (T. 877-880). She was divorced after 10 months of marriage (T. 550), married Mr. Badore about nine months before Lestage was murdered (T. 550), and engaged in extra-marital relations with the defendant Berard during that period. (T. 549, 561, 715, 819).

¹The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. (citations omitted). But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. Alford v. U.S., 282 U.S. 687, 694 (1930).

She had participated with Berard in a larceny a few days before the murder of Raymond Lestage (T. 735-6), and she was aware that a crime, of an undisclosed nature, was to be perpetrated the night of August 12, 1972. (T. 565-6, 656-7). Her abuse of alcohol was extensively probed (T. 606-609, 672-674, 700, 706, 716, 839-841) to the extent that it was shown she started to have a problem with alcohol at seventeen years of age. (T. 881). See Berard Brief, pp. A-24, A-25.

The extensive cross-examination of Mrs. Badore "was entirely adequate to afford the jury a basis to properly appraise the witness' motivation and to evaluate the theory of the defense that her testimony was not worthy of belief." Berard Brief, p. A-25, A-26. Judge Holden cites this Court's ruling in U.S. v. Ong, [541 F.2d 331 (CA 2 1976), cert. den. 45 LW 3509, 97 S.Ct. 814 (1977)], in support of his conclusion in the preceding sentence. Ong's co-defendant, Wah, claimed undue curtailment of his cross-examination of an INS investigator whose direct testimony may have inferred Wah's involvement in narcotics. In the instant case review, as in Ong, should be upon the predicate that the State produced overwhelming proof of Berard's guilt [State v. Berard, 132 Vt. 138, 152 (1974)] and therefore:

We view the claims of error accordingly and consider the possible effects to be less serious than we would if the case ...could be considered to be a close question. As we conclude beyond a reasonable doubt that contrary rulings on all the matters of which the appellants complain would have still resulted in the verdicts returned by the jury, we affirm all the convictions. U.S. v. Ong, 541 F.2d 331, 334 (1976), (citing Brown v. U.S., 411 U.S. 223, 231-32, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973)).

As in the Ong case the three areas of cross-examination that were denied Berard did not preclude "investigation into other legitimate areas." Id. at p. 341; this Court has distinguished the complete bar of cross-examination in Davis v. Alaska from Wah's exercise of the same right in Ong:

Finally, we do not agree that the Court's order prevented this jury from having "the benefit of the defense theory before them" by denying a defendant "the effective cross-examination...of an adverse witness." Id. at p.342 [citing Davis v. Alaska, 415 U.S. 308, 317, 319-20, 94 S.Ct. 1105, 112, 39 L.Ed.2d 347 (1974)].

The scope of the Davis holding in remote, speculative, and tangential areas of cross-examination was held by the Vermont Supreme Court as follows:

We do not believe that the Court in Davis meant to sanction speculative expeditions into areas only tangentially related to the facts in issue in the hope that some basis for implying an ulterior motive might be found. Id. at p.342, accord State v. Berard, 132 Vt. 138, 146-152, 315 A.2d 501 (1974), cert. den. 417 U.S. 950. (emphasis supplied).

A. THE TRIAL COURT PROPERLY EXCLUDED INTERROGATION AS TO
MRS. BADORE FEARING POSSIBLE LOSS OF HER CHILD.

Judge Holden in the Memorandum And Order examines the concern of Badore over the possible loss of custody of her infant son. (A-19, A-20). This concern appears to have originated from an unrelated complaint which Mrs. Badore's mother had made to authorities, some time prior to the Lestage murder, and, apparently had never pursued. (See Holcomb deposition, SA-1,2). The question by Berard's attorney as to whether Berard suggested to Badore that she not say anything about him or the police might do something about her child (Berard Brief, p. A-6) was without basis in fact because Berard's attorney on the same page of the Appendix conceded that no such attempts were made by the police. It is also noteworthy that Sgt. Richard A. Spear, officer in charge of this case, was neither deposed nor examined at trial on this issue, nor was a representative of the Vermont Department of Social and Rehabilitation Services called. The latter unit is vested with petitioning, investigative and custodial authority for Vermont children deemed in need of care and supervision. 33 V.S.A. Ch. 12.

At p. 14 of his Brief, Berard refers to Mrs. Badore as sharing a "vulnerable status" as did the witness Green in Davis v. Alaska. Certainly the distinction is clear. With Berard's own counsel's concession that no effort had been made by the police to influence Badore's testimony by threatening removal of her child, then no evidence existed as did the record of Green's juvenile probation in Davis.

This is most clearly a "speculative expedition" into a tangential area. U.S. v. Ong, 541 F.2d 331, 342 (CA 2 1976). And any such exploration, devoid of a factual basis, subjects the witness to harassment, annoyance or humiliation within the trial court's province to protect the witness. Alford v. U.S., supra at p. 694.

For the foregoing reasons there was no error in the trial court's rulings or the denial of Berard's petition for the writ of habeas corpus.

B. QUESTIONS ON CROSS-EXAMINATION PERTAINING TO POSSIBLE
PLANS OF BADORE TO PUBLISH HER ACCOUNT OF THE MURDER WERE
PROPERLY EXCLUDED.

Berard's counsel asks too much from the line of cross-examination he chose to conduct on the account of the crime which Mrs. Badore wrote. He was clearly beyond the scope of redirect examination and speculating that a "novel" would sell better than Mrs. Badore's biography. This supposition was advanced as tending to induce her to "glamorize" the events. Though given numerous opportunities to develop the existence of any plans for publication by deposition or witness testimony, Berard's attorney was again in the area of speculation and collateral matters. There was no reason to believe she would realize any more profit from publication if she testified than if she did not. In a Vermont case it was held:

The pursuit of a witness into the realm of collateral must, of necessity, end somewhere--or litigation would not.
State v. Teitle, 117 Vt. 190, 196, 90
A.2d 562 (1952).

It is important to note that Mrs. Badore's testimony and her account were corroborated extensively by testimony of 48 other witnesses. The misgivings as to her credibility expressed on pp. 16-17 of Berard's Brief were resolved in her favor by juries in the Berard case and in the separate trials of Bernard Woodmansee, Sr. and Ray L. Rebideau.

This Court has held that cross-examination of a witness on his intentions to write a book to reveal any financial interests he may have in the litigation is speculative on

the issue of whether such interests would be better served by a conviction or an acquittal. Where credibility and the witness' motives to testify were thoroughly challenged, as was done in Berard's trial, there was no error in the trial court's excluding the testimony. U.S. v. Reed, 439 F.2d 1, 3-4 (CA 2 1971); U.S. v. Reed and White, 437 F.2d 57 (CA 2 1971).

C. CROSS-EXAMINATION AS TO POSSIBLE FANTASIES OF CRIMINAL
ACTIVITY AND FALSE ACCUSATION WAS PROPERLY RESTRICTED.

The mental problems of Mrs. Badore were fully disclosed to the jury in the context of her testimony against Berard. (See p. of State's Brief); see Memorandum and Order, pp. A-21 to A-23. Furthermore, the defense called a psychiatrist, who, under this court's guidelines established in U.S. v. Hiss [88 F.Supp. 559 (1950); 185 F.2d 822 (1950)], testified to an extensive history of family problems including mental illness and deviate behavior. (T. 1189-90). Thereafter, the doctor testified to his diagnoses of Mrs. Badore's maladies beginning in 1966. (T. 1191). The results of personality tests in 1966 and in January, 1973 were explained to the jury (T. 1199-1203) which included references to her behavior by the psychiatrist as: "very self-dramatic," "a hysteroid," "a good actress, and a very capable person in this field," "a very selfish person" and "this girl's control (over her impulses) is not all that hot."

Testimony as to her receiving threats was presented (T. 1208) as accounting for Mrs. Badore's anxiety. As to threats she received from those persons involved in the trial (Berard), her reaction was described as normal. (T. 1209). On the State's cross-examination further normal anxiety reactions of Badore, under the circumstances of the case, were developed. (T. 1211-1212).

A reading of Berard's Brief on the proffered testimony of fantasy and false accusation shows, as does the trial transcript, the vague and exploratory nature of the questioning. It was not related to the events that were the subject of the trial nor was any relevant time established to preclude remote, non-probative matter. Taken as a whole, the cross-examination was permitted in compliance with the holdings of Davis v. Alaska and U.S. v. Ong. See Argument I, ante.

II. THE DISTRICT COURT PROPERLY FOUND THE THREE AREAS OF CROSS-EXAMINATION OF BADORE WERE TANGENTIAL TO THE MAIN AREAS OF INQUIRY THAT HAD BEEN EXPLORED IN DEPTH.

In the Memorandum and Order denying Berard's petition for the writ of habeas corpus, Judge Holden, after setting out the caselaw interpreting Davis v. Alaska, then examined each of Berard's three cross-examination issues raised in this appeal. (The Child Custody, A-19-20; Public Denial of a Novel, A-20-21; False Accusations and Reported Fantasies, A-21-23). Upon determining that the matters sought in cross-examination were tangential and collateral matters, their exclusion was held to be a proper exercise of discretion by the trial judge and no issue of denial of the right of Confrontation was presented. (A-23-26).

The total exclusion of areas of inquiry that lead the reviewing courts to the conclusion that the Confrontation Clause was violated, do not appear in the instant case. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (denial of use of juvenile probation); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (use of preliminary hearing transcript against defendant); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1972) (exclusion of examination of witness' repudiation of prior confession to murder and on alibi). The foregoing cases clearly applied Confrontation principles to evidence sought by the defense at trial which were central to the defense. Judge Holden, distinguishing these cases, concluded in his Memorandum and Order:

In sum, the record effectively demonstrates that defense counsel was unrelenting in delving into the witness' character, her mental illness and motivations were covered in one fashion or another. In the course of the extensive cross-examination over the large part of three trial days the trial court was now and then called upon to preclude remote, repetitive and sometimes harassing inquiries. The court's reading of the extensive record fails to indicate that any of the exclusionary rulings directly affected the guilt or innocence of the accused. Rather, they concerned collateral matters that were otherwise developed in Badore's testimony or evidence by other witnesses. Berard Brief, Appendix pp. A-24-25; State's Brief, Argument I(b) p. 7, ante.

The pre-Davis caselaw in this Circuit required that to impeach a witness by extrinsic proof of a prior inconsistent statement, it was only permissible to do so as to non-collateral matters, i.e., as to matters which were relevant to the case and could be independently proven, U.S. v. Blackwood, 456 F.2d 526, 531 (1972). The collateral nature of the cross-examination in the instant case is clear: that fears of the loss of custody of her child were suggested to Mrs. Badore by Berard himself and no State action was taken for this purpose; the publication of Badore's account was raised by Berard's counsel and not through her prior statements or by an independent witness; and, the claimed false accusations and fantasies were not related to the events surrounding Berard's trial. Pertinent areas of the latter line of examination were fully probed by direct and cross-examination of Badore's hospitalization in mental hospitals (T. 877-881) and by the testimony of one of her prior attending psychiatrists. (T. 1183-1213).

Berard's citation of U.S. v. Harvey, 547 F.2d 720 (CA2, 1976) is factually distinguishable from the instant case. The testimony improperly excluded as "collateral" in Harvey would have tended to show a witness vital to the defendant's identification had previously lived with Harvey, borne his child, had not received support from him, and that her husband, upon learning of this, beat her and broke her leg. Her statement to "take revenge" against Harvey had a clear and direct bearing of the credibility of her identification. No such motivation or bias on the part of Badore to fabricate her testimony against Berard appears in the instant case. The three areas of testimony are similar to Wah's foreclosure in Ong..."as he would have attempted only to rebut a supposed inference..." U.S. v. Ong, 541 F.2d 331, 341 (CA 2, 1976). In Ong this Court held of the collateral theme of coercion by narcotics involvement, "We find that Wah's argument that he wanted to show coercion in the narcotics context is too remote and speculative in the face of the complete absence of any evidence of coercion in the conversation." Id. at p. 342. It is clear from Judge Holden's Memorandum and Order that he has followed this Court's holding in Ong to evaluate compliance with Davis, i.e. whether "...the total cross-examination was sufficient to afford the jury a basis to evaluate the defense theory." Id., at p. 342. See U.S. v. Green, 523 F.2d 229, 237 (1975); Flemmi v. Gunter, 410 F.Supp. 1361, 1371 (D.C.Mass. 1976).

For the foregoing reasons the trial court properly excluded the three lines of cross-examination as tangential and collateral matters.

III. THE DISTRICT COURT'S RULING THAT BERAPD SUSTAIN THE BURDEN OF PROVING PREJUDICE WAS CORRECT.

(a) It has been well established in federal and state courts that the burden of proof in a habeas corpus proceeding is upon the petitioner. Schuster v. Herald, 410 F.2d 1071, 1085 (CA 2 1969) cert. den. 396 U.S. 847, 90 S.Ct. 81, 24 L.Ed.2d 96 (1969).

The United States Supreme Court, in the same Term that it decided Davis v. Alaska refused certiorari in a habeas corpus proceeding from the United States Court of Appeals for the Fourth Circuit. In that case the prisoner, Wright, convicted of rape raised constitutional issues of adequacy of Miranda warnings and voluntariness of inculpatory statements. The Wright court ruled that the burden of proof was on the petitioner.²

²"In habeas proceedings involving a state prisoner, a federal court must independently apply the constitutional standards to the historical facts on which the petitioner predicates his claim, regardless of how clearly and fairly and completely the claim has been litigated in the state courts. But when the state court has applied the proper constitutional standards and the issue concerns only the historical facts as found and declared by the state court, which is the situation here...Townsend v. Sain, 372 U.S. 293, 316, 83 S.Ct. 745, 9 L.Ed.2d 770, provides that, in the absence of any of the circumstances specifically enunciated therein, the findings of the state court are presumed to be correct and the petitioner has the burden of establishing by convincing evidence that the evidentiary record in the state court does not 'fairly support' the findings made by the state court." (and cases cited in footnote 9) Wright v. State of North Carolina, 483 F.2d 405, 408 (1973) cert. den. 415 U.S. 936, 94 S.Ct. 1452, 39 L.Ed.2d 494 (1974).

The United States Supreme Court ruled on the habeas corpus petitioner's burden of proving violations of his constitutional rights at trial. The petitioner in United States v. Handy was under a sentence of death for murder. The issue raised in his habeas corpus appeal was whether his trial had been so prejudiced that he was denied due process. The court ruled on his burden of proof:

"Petitioner has been given ample opportunity to prove that he has been denied due process of law. While this court stands ready to correct violations of constitutional rights, it also holds that it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." (cites omitted).

United States v. Handy, 351 U.S. 454, 462, 76 S.Ct. 965, 100 L.Ed. 1331 (1956).

The United States Court of Appeals for the Second Circuit reached the same conclusion in United States v. Smith, 306 F.2d 596 (CA 2 1962) cert. den. 372 U.S. 959, 83 S.Ct. 1012, 10 L.Ed.2d 11 (1963). Smith was serving a life sentence for arson causing death. This Court revoked Smith's bail that had been granted by the United States District Court for Vermont and ruled, citing Beck v. Washington 369 U.S. 541, 558, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962):

That the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality. United States v. Smith, 306 F.2d at 602.

For the burden of proof to shift to the state, the procedure employed by the state must involve such a probability that prejudice will result that it is deemed inherently lacking in due process. See, Estes v. Texas, 381 U.S. 532, 542-3, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

An examination of more than 200 pages of trial transcript does not reveal any restriction of cross-examination that would raise to the level of inherent lack of due process or "constitutional error of the first magnitude" such as was found in Davis v. Alaska, 415 U.S. at 318.

(b) Even if this Court were to determine that error of constitutional dimension occurred, such error was harmless because it made no contribution to the criminal conviction. The constitutional error must have been harmful. Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972).³

³ "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court...years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond a reasonable doubt, harmless." Milton v. Wainwright, 407 U.S. at 377-8.

The Supreme Court in its constitutional harmless error standard has accommodated relatively unimportant evidence, as are the three areas of examination claimed to have been unduly restricted by Berard:

There may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction. Chapman v. California, 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705.

Berard does not show how, if at all, his substantial rights were affected. In view of over two days of cross-examination of Mrs. Badore on virtually every facet of her personality and of the crime, with the considerable weight of the evidence against Berard, any conceivable error of a constitutional dimension was harmless. See Harrington v. California, 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726 (1969); U.S. v. Zubkoff, 416 F.2d 141 (CA 2 1969).

IV. BERARD HAS FAILED TO SHOW THAT THE RULINGS OF THE TRIAL COURT IN EXCLUDING CERTAIN EVIDENCE ON CROSS-EXAMINATION OF MRS. BADORE RESULTED IN PREJUDICE.

(a) In the fourth argument of his Brief, Berard argues issues of credibility pertaining to Mrs. Badore's testimony. The law is well established in Vermont, as elsewhere, that the jury functions as the sole judge of the credibility of witnesses. State v. Martel, 122 Vt. 491, 494, 177 A.2d 236 (1961). Within that function they may accept the truth of a part of a witness' testimony and regard other parts of the testimony as unworthy of belief. State v. Connolly, 133 Vt. 565, 568, 350 A.2d 364 (1975). The jury was fully instructed on these principles by the trial court (T. 1321-1324, 1327-1328, 1334) and presumably, they followed them.

The conviction of Berard for the offense of first degree murder was automatically reviewed by the Vermont Supreme Court. V.R.A.P. 3(b). Similar claims of undue restriction on Mrs. Badore's cross-examination were raised in that appeal. In its opinion the Court held:

Our review of the entire record demonstrates the presence of overwhelming and uncontradicted evidence against the defendant. [Berard]. The opinion of Chief Justice Burger in Milton v. Wainwright, 407 U.S. 371 (1972), a first degree murder case, held that because the jury had heard overwhelming evidence of Milton's guilt, the error, if any, was harmless beyond a reasonable doubt. To the same effect, Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967); Gilday v. Commonwealth, 355 Mass. 799, 247 N.E.2d 396 (1969). The defendant has not shown how he was prejudiced by the questions excluded in his cross-examination of Mrs. Badore, and we find none.

State v. Berard, 132 Vt. 138, 152,
315 A.2d 501 (1974), cert. den.
417 U.S. 950. See also, State v.
Rebideau, 132 Vt. 445, 449, 321
A.2d 58 (1974).

The full review of Berard's claimed error by the Vermont Supreme Court and by the United States District Court, which determined no prejudice was shown, complies with requirements of the United States Supreme Court:

"While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'" Beck v. Washington, 369 U.S. 541, 558, 82 S.Ct. 955, 964, 8 L.Ed.2d 98 (1962) [citing U.S. ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S.Ct. 965, 970, 100 L.Ed. 1331 (1950)].

On the basis of the Beck decision, supra, it is clear that Berard has failed to demonstrate prejudice arising from the trial court's limitation of cross-examination as to Mrs. Badore's custody of her child. No act of the state was responsible for any motivation on her part to testify in any untruthful manner. See State's Brief, Argument I(A), pp. 5-6. Impeachment upon such a collateral issue was improper. State v. Donaldson, 101 Vt. 483, 144 A.684 (1929); State v. Lapan, 101 Vt. 124, 141 A.686 (1928). Lack of prejudice is further shown due to the Vermont caselaw that, "to be admissible evidence proffered must not only have logical relevance, but have probative weight." State v. Dragon, 130 Vt. 334, 292 A.2d 826, 831 (1972); State v. Ceresa, 92 Vt. 190, 102 A.1040

(1918). Additionally, the evidence appears too remote to be probative, and no abuse or withholding of discretion has been shown. State v. Emrick, 129 Vt. 475, 282 A.2d 821, 825 (1971).

The publication of an account of the crime by Mrs. Badore was properly excluded as set forth in Argument I(B) of the State's Brief, pp. 7-8. Saleability of such an account had no relation to Berard's conviction or acquittal. Where the trial witness' difficulties with the defendant's brother were excluded, the Vermont Supreme Court held, "It is a mere matter of speculation under the offer as to whether any such trivial matter as that mentioned in the offer created any bias in the witness against the respondent." State v. Quesnel, 116 Vt. 68, 69, 69 A.2d 6 (1949). On the State's re-direct examination of Badore no monetary considerations regarding her account were explored and, therefore, such matters were properly excluded as being outside the scope of re-cross-examination. State v. Morrill, 127 Vt. 506, 513, 253 A.2d 142 (1969).

Berard's last claim of error pertains to restriction of cross-examination into what he terms her "former false accusations and fantasies involving criminal activities." (Berard Brief, p. 18). Lack of prejudice is shown in Argument I(C) of the State's Brief which points the broad scope afforded Berard to develop this area by psychiatric testimony. State's Brief, pp. 9-10. Impeachment as to criminal activity was properly excluded because it was not conducted upon a conviction

of an offense involving moral turpitude within the last fifteen years. 12 V.S.A. §1608; Pond v. Carter, 126 Vt. 299, 229 A.2d 248, 255 (1967).

Upon Berard's failure again to demonstrate in what substantial way he was prejudiced by the trial court's limitations on his cross-examination into three remote, speculative and collateral areas, his claim should be rejected.

(b) At p. 41 of his Brief, Berard asserts the evidence against him was entirely circumstantial and insufficient to sustain his conviction under Vermont law. Although this claim does not appear to have been raised in prior reviews by Berard, it was raised by his co-defendant, Rebideau, upon the mandatory review of his first degree murder conviction. In rejecting the argument the Vermont Supreme Court stated, "The bulk of the state's case is based on the direct eye-witness testimony of Linda Badore, both as to events leading up to the homicide, the homicide itself, and the subsequent concealment." State v. Rebideau, 132 Vt. 445, 454, 321 A.2d 58 (1974). Mrs. Badore's direct observation of the use of the murder weapons on Lestage were more limited as to Berard than as to Rebideau, however, she saw Berard follow Lestage into the cemetery, heard a number of shots, saw him return to the car and obtain the shotgun, fire another shot, and later report how he had killed Lestage.

For these reasons the Vermont law on cases comprised "wholly and entirely" of circumstantial evidence was properly not invoked. State v. Bruce, 126 Vt. 367, 231 A.2d 107 (1967).

CONCLUSION

Based upon the foregoing, the Order of Chief District Judge, James S. Holden, dated March 8, 1977 and the judgment thereon denying the application of Frank J. Berard, Jr. for the writ of habeas corpus should be affirmed.

Respectfully submitted,

STATE OF VERMONT
M. JEROME DIAMOND
Attorney General

By:


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the State of Vermont was delivered to the law office of Peter F. Langrock, Esq., Langrock & Sperry, Middlebury, Vermont, on the 22^d day of June, 1977.


PAUL F. HUDSON
Assistant Attorney General
Chief, Criminal Division

STATE'S APPENDIX

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Excerpts from deposition of Cora Holcomb.....	SA-1, SA-2

QUESTIONS RELATING TO BABY

Cora Holcomb deposition (12/29/72), pages 7-8, Peter F. Langrock, Esq. examining.

* * *

Q. Have you ever had any dealings with the Social Welfare Department -- conversation about the child and whether he was being properly cared for?

A. With Social Welfare?

Q. Or any social workers.

A. There was one time I had a day off from work. My husband works nights, and he was home. We were having a linoleum put in the kitchen and the house was a mess -- all torn up, and I received a telephone call from I think Mrs. Gonyeau, I think her name was. She said she had Linda's baby. She was babysitting. She was taking care of the baby, and she told me the baby was very, very sick and his eyes were rolling in the back of his head, and he hadn't eaten, and did I know where Linda was, and I said, no, I didn't know where Linda was, but she should take this baby for medical attention, and she said she didn't think she could take him without the mother, and I said, "Yes, you can. No one will refuse you." I called back -- I had an awful time getting her on the phone, and I asked her if she had called a doctor, or a police cruiser, or anyone who would take her to the hospital with the baby, and she said no, and she gave me the impression she want's going to do it until she could find Linda. This did upset me because

I do love the baby, so I called Mrs. Contois, who's a friend of mine anyway, and I asked her if she would go down and see that the baby got some medical attention before anything happened to it. I was upset at the time, but I can't blame Linda for this because she did have him with a babysitter. She didn't leave him alone.

Q. Who's Mrs. Contois?

A. She's a police woman in Burlington.

Q. Do you remember anything you said at that time that could have been interpreted that Linda wasn't a fit mother?

A. I don't remember. I may have because I was quite upset, but I didn't mean it. You say a lot of things when you're upset that you don't mean.

* * *



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June 21, 1977

A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Berard v. Hogan
No. 77-2044

Dear Mr. Fusaro:

Enclosed for filing in the above cause please find
twenty-five copies of the Brief of the Appellee, Cornelius
Hogan, Commissioner of Corrections for the State of Vermont.
Copies have been provided Mr. Langrock pursuant to the
Rule.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Paul F. Hudson".

PAUL F. HUDSON
Assistant Attorney General
Chief, Criminal Division

PFH:msc

Encl.

cc: Peter F. Langrock, Esq.